

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

COMPLAINT OF THE CENTER FOR ART AND
MINDFULNESS, INC. AND NORTON HAZEL

Docket No. C2015-1

**UNITED STATES POSTAL SERVICE ANSWER IN OPPOSITION TO
COMPLAINANTS' MOTION FOR RECONSIDERATION**
(April 8, 2015)

On March 4, 2015, the Postal Regulatory Commission (Commission) issued Order No. 2377, which granted the United States Postal Service's (Postal Service) Motion to Dismiss the complaint of the Center for Art and Mindfulness (CAM) and Norton Hazel (collectively "Complainants"), PRC Docket No. C2015-1.¹ On April 1, 2015, Complainants filed a Motion for Reconsideration and a Brief in Support of their Motion for Reconsideration in which Complainants presented no new factual or legal argument to justify reconsideration.² The Commission considered Complainants' arguments and correctly applied past precedent when dismissing the Complaint. For the reasons set forth below, the Commission should deny Complainants' Motion for Reconsideration.

PROCEDURAL BACKGROUND

On December 29, 2014, Complainants filed a five count complaint with the Commission alleging various statutory, regulatory, and common law violations.³ On

¹ Order No. 2377, Order Granting Motion to Dismiss, PRC Docket No. C2015-1 (Mar. 4, 2015).

² Motion for Reconsideration and Brief in Support of Motion for Reconsideration of Commission Order of Center for Art and Mindfulness, Inc. and Norton Hazel (collectively "Motion for Reconsideration"), PRC Docket No. C2015-1 (Apr. 1, 2015).

³ Complaint of Center for Art and Mindfulness, Inc. and Norton Hazel, Docket No. C2015-1, (Dec. 29, 2014) (Complaint).

January 20, 2015, the Postal Service filed a Motion to Dismiss the Complaint citing several grounds for dismissal, including the Commission's lack of subject-matter jurisdiction, Complainants' failure to state a claim upon which relief may be granted, claim and issue preclusion, mootness, and failure to comply with procedural requirements.⁴ On January 28, 2015, a day after any responsive pleading was to be filed, Complainants filed a motion for extension, requesting additional time to file an answer due to their representative's international travel.⁵ On January 29, 2015, the Commission issued Order No. 2334, which granted Complainants' request for additional time to file and ordered that Complainants file their answer by February 2, 2015.⁶

On February 4, 2015, two days after the deadline imposed by Order No. 2334, Complainants filed their untimely opposition to the Postal Service's Motion to Dismiss and a motion for late acceptance.⁷ In their Response in Opposition, Complainants argued that the Commission had jurisdiction to consider the Complaint by virtue of sections 3662, 401(2), 403(c), 404(a), and 410(b)(2) of title 39 of the U.S. Code.⁸ Additionally, Complainants stated that they "have filed" an amended complaint.⁹ However, Complainants did not file an amended complaint or a motion for leave to file

⁴ United States Postal Service Motion to Dismiss the Complaint of the Center for Art and Mindfulness, Inc. and Norton Hazel, Docket No. C2015-1, (Jan. 20, 2015) (Motion to Dismiss).

⁵ Motion to Extend Time, Docket No. C2015-1, (Jan. 28, 2015).

⁶ Order No. 2334, Order Granting Extension of Time to Respond to Motion to Dismiss, Docket No. C2015-1, (Jan. 29, 2015).

⁷ Reply of the Center for Art and Mindfulness, Inc. and Norton Hazel in Opposition to the United States Postal Service's Motion to Dismiss Their Complaint, Docket No. C2015-1, (Feb. 4, 2015) (Response in Opposition). Motion for Late Filing of Response to USPS Motion to Dismiss, Docket No. C2015-1, (Feb. 4, 2015) (Motion for Late Acceptance).

⁸ Response in Opposition at 6-12.

⁹ *Id.* at n.1.

an amended complaint until February 26, 2015.¹⁰ In their Amended Complaint, Complainants repeated many of the same jurisdictional arguments they outlined in detail in their Response in Opposition.

On March 4, 2015, the Commission issued Order No. 2377, which granted the Postal Service's Motion to Dismiss the Complainants' claims. In Order No. 2377, after considering the claims and arguments included in both the original Complaint and the Amended Complaint, the Commission concluded that Complainants failed to state a claim under section 403(c), since Complainants' alleged violation involved the disposal of real property, which "does not qualify as a 'service' subject to the Commission's review."¹¹ The Commission also concluded that none of the claims in the Complaint fell within the Commission's jurisdiction under 39 U.S.C. § 3662.¹²

Four weeks later, on April 1, 2015, Complainants filed a Motion for Reconsideration and a brief supporting that motion. Complainants argue that Order No. 2377 contains factual errors regarding the status and posture of CAM's claims in its case before the District Court.¹³ Complainants also argue that in Order No. 2377, the Commission failed to apply prior holdings.¹⁴ Lastly, Complainants argue that Order No. 2377 ignored and failed to discuss the jurisdictional arguments that they outlined in their Amended Complaint.¹⁵

¹⁰ Complainants' Motion to File Amended Complaint, Docket No. C2015-1 (Feb. 26, 2015) (Motion to Amend the Complaint). Amended Complaint of the Center for Art and Mindfulness, Inc. and Norton Hazel Against the United States Postal Service, Docket No. 2015-1 (Feb. 26, 2015) (Amended Complaint).

¹¹ Order No. 2377 at 6.

¹² *Id.* at 7.

¹³ Motion for Reconsideration at 5.

¹⁴ *Id.* at 5-9.

¹⁵ *Id.* at 9-12.

ARGUMENT

I. COMPLAINANTS FAIL TO RAISE ANY FACTUAL ERRORS THAT REQUIRE RECONSIDERATION AND REVERSAL OF ORDER NO. 2377.

In their Motion for Reconsideration, Complainants argue that Order No. 2377 contains factually incorrect information. Specifically, Complainants argue that the Commission's summary stating that the "Art Center's claims were ultimately dismissed by the Federal District Court on November 26, 2014," is incorrect.¹⁶ Complainants argue that this statement implies that District Court dismissed all of CAM's claims on the merits after an opportunity for consideration.¹⁷ Complainants contend that this statement is a manifest error of fact which requires the Commission to reconsider and reverse Order No. 2377.¹⁸

Complainants' contention that Order No. 2377 misstates the status and posture of CAM's claims before the District Court is an unnecessarily narrow interpretation of the Commission's summary of the prior litigation. Order No. 2377 contains two sentences that mention CAM's prior litigation before the District Court:

The Art Center filed a lawsuit against the Postal Service and the Postmaster General in the Federal District Court of Connecticut in September 2013, challenging the proposed sale of the Atlantic Street Station on various legal grounds. The Art Center's claims were ultimately dismissed by the Federal District Court on November 26, 2014, and the Atlantic Street Station property was sold shortly thereafter to Cappelli on December 4, 2014.¹⁹

These statements were not intended to furnish an in-depth review of CAM's previous claims or the manner in which the District Court disposed of them. Rather, these

¹⁶ *Id.* at 4.

¹⁷ *Id.*

¹⁸ *Id.* at 5.

¹⁹ Order No. 2377 at 3 (internal citation omitted).

statements were a simple acknowledgement that CAM previously challenged the sale before the District Court and the District Court ultimately dismissed its challenges.

Furthermore, even if the statement cited by Complainants constitutes a factual error, the Commission explicitly stated that its holding did not rely on the outcome of CAM's claims before the District Court. In Footnote 6, the Commission states that "as the Commission has determined that it does not have jurisdiction to hear the Complaint, it need not address the impact, if any, of the proceedings before the Federal District Court."²⁰ Therefore, the status and posture of CAM's prior claims before the District Court did not influence the outcome of this controversy in Order No. 2377. Accordingly, Complainants fail to raise any manifest error of fact that requires the Commission to reconsider and reverse its holding in Order No. 2377.

II. THE COMMISSION DID NOT MISAPPLY PRIOR PRECEDENT AS BOTH THE COMMISSION AND THE D.C. CIRCUIT RECOGNIZED THAT THE SALE OF PROPERTY BY THE POSTAL SERVICE IS NOT SUBJECT TO THE COMMISSION'S REVIEW.

Complainants argue that Order No. 2377 failed to apply prior Commission and Third Circuit [sic] precedent that holds that the leasing of property is a nonpostal service subject to Commission review.²¹ Complainants argue that this constitutes a manifest error of law and requires reconsideration and reversal of Order No. 2377. However, Complainants misstate the holding of Order No. 2377. The Commission concluded that the "sale of real property does not qualify as a 'service' subject to the Commission's

²⁰ *Id.* at n.6. In a similar vein, the Commission also stated that since it determined that the Complaint should be dismissed on jurisdictional grounds, it is unnecessary to address the question of whether the doctrine of *res judicata* requires dismissal of the Complaint. *Id.* at 7.

²¹ Motion for Reconsideration at 4. Complainants repeatedly mention that the Commission failed to apply Third Circuit precedent; however, their Motion for Reconsideration does not cite any Third Circuit case law in support of their contention that the sale of real property is a nonpostal service subject to Commission review.

review.”²² The underlying controversy in the instant proceeding involves the sale of real property. As such, prior Commission precedent regarding the *leasing and licensing* of postal property does not apply. Thus, contrary to arguments made by Complainants in their Motion for Reconsideration, Order No. 2377 is consistent with prior precedent.

By way of background, the Postal Accountability and Enhancement Act (PAEA) required the Commission to review each nonpostal service offered by the Postal Service on the date of enactment of the PAEA and determine whether that nonpostal service shall continue.²³ On December 20, 2007, the Commission initiated PRC Docket No. MC2008-1 to fulfill these responsibilities.²⁴ In Order No. 154, the Commission defined “service” to mean “[a]ny ongoing, commercial activity offered to the public for the purpose of financial gain.”²⁵ In Order No. 154, the Commission identified 47 revenue-generating activities and divided these activities into three groups: six activities were postal services, fifteen activities were nonpostal services, and twenty six were not services and not subject to Commission review.²⁶

Contrary to Complainants’ argument that “USPS activity was divided into postal services and nonpostal services and nothing else,”²⁷ the Commission recognized a

²² Order No. 2377 at 6 (emphasis added).

²³ 39 U.S.C. § 404(e).

²⁴ Order No. 50, Notice and Order Concerning Review of Nonpostal Service, PRC Docket No. MC2008-1, (Dec. 20, 2007).

²⁵ Order No. 154 at 15.

²⁶ Order No. 154, Review of Nonpostal Services under the Postal Accountability and Enhancement Act, PRC Docket No. MC2008-1 (Dec. 19, 2008), at 3, Appendix I, “Treatment of Revenue Producing Activities Identified in Postal Service Response to Order No. 74.”

²⁷ Motion for Reconsideration at 8. Complainants misrepresent the context of the Postal Service’s position in *U.S. Postal Service* regarding the treatment of leasing of real property as a nonpostal service. The focus of the argument was not whether leasing of real property was a nonpostal service, but whether this activity was a nonpostal service subject to the Commission’s review under section 404(e).

class of revenue generating activities that are neither postal services nor nonpostal services. This class of activities includes the sale of real property.²⁸ In finding that the sale of real property is not a service, the Commission determined that the disposal of used, excess, or underutilized property fails to meet the definition of a “service” because the sale of real property is not “ongoing”.²⁹ Thus, the Commission’s finding in Order No. 154 does not support Complainants’ contention that the sale of real property is a nonpostal service. Rather, the Commission is explicit in its conclusion that the sale of real property is not a service.

Complainants repeatedly assert that any action taken by the Postal Service must be either a postal service or a nonpostal service, ignoring the fact that some actions are not “services” at all.³⁰ Throughout their Motion for Reconsideration, Complainants appear to rely on the D.C. Circuit Court decision in *U.S. Postal Service v. Postal Regulatory Commission* to support their claim that all Postal Service activities must either be postal or nonpostal activities. Complainants’ argument is erroneous as both the D.C. Circuit Court and the Commission acknowledged that “several revenue-generating activities—including the sale of property. . . did not qualify as ‘services’ and thus were not subject to the Commission’s review.”³¹ Therefore, not only is Complainants’ argument not supported by *U.S. Postal Service*, but the D.C. Circuit

²⁸ Order No. 154 at 66 and Appendix I.

²⁹ *Id.* at 66.

³⁰ Motion for Reconsideration at 6 (“The D.C. Circuit specifically rejected any category of postal activity that was categorized as ‘not nonpostal’. . .”), 7 (“The PRC specifically rejected the efforts of the USPS to cast necessary activities of the USPS such as buying and leasing real estate as ‘not nonpostal service.’”), and 8 (“Thus, USPS activity was divided into postal services and nonpostal services and nothing else.”).

³¹ *U. S. Postal Serv. v. Postal Regulatory Comm’n*, 599 F.3d 705, 708 (D.C. Cir 2010) (emphasis in the original). See also Order No. 154 at 66.

Court opinion refutes the proposition that the sale of real property is subject to the Commission's review.

Moreover, even if the Commission were to ignore this clearly-established distinction between the sale of real property and nonpostal services, the sale of the Atlantic Street Station would *still* not be a source of controversy for a section 3662(a) complaint. The fact that the Commission itself has jurisdiction over a particular matter in any given context (such as nonpostal services under section 404(e)) does not mean that it has section 3662 *complaint jurisdiction* over that issue. The Commission's authority to hear complaints is limited to the enumerated provisions listed in 39 U.S.C. § 3662(a), which include sections 101(d), 401(2), 403(c), 404a, 601, or chapter 36 (or regulations promulgated under any of these provisions). This list does not include 39 U.S.C. § 404(e), which outlines regulatory authority of nonpostal services. The Commission has consistently recognized these limitations in prior orders dismissing other parties' complaints.³²

III. THE COMMISSION PROPERLY DISMISSED THE COMPLAINT BECAUSE THERE WAS NO JURISDICTIONAL BASIS FOR THE COMMISSION TO REVIEW THE COMPLAINT UNDER 39 U.S.C. § 3662(a).

In their Motion for Reconsideration, Complainants argue that Order No. 2377 ignores and does not discuss the 39 U.S.C. § 3662(a) jurisdictional bases of Counts II-IV of the Amended Complaint.³³ Contrary to Complainants' claims, however, the order did indeed consider arguments raised in Complainants' Amended Complaint.

³² See e.g. Docket Nos. C2013-3 through C2013-9 (claims under section 302 of the PAEA dismissed because that section was not one of the provisions enumerated in 39 U.S.C. § 3662.); see *also* Docket No. C2010-2 (complaint on grounds that none of the allegations in the complaint implicated any of the enumerated provisions in 39 U.S.C. § 3662, thereby depriving the Commission of jurisdiction).

³³ Motion for Reconsideration at 9.

Specifically, the Commission observed that the jurisdictional arguments made in the Amended Complaint “do not affect the Commission’s analysis of conclusions regarding the disposition of the Complaint.”³⁴ The Commission clearly and efficiently disposed of Complainants’ jurisdictional arguments in Order No. 2377. The Motion for Reconsideration does not introduce any new legal arguments in support Complainants’ claim that the Commission has complaint jurisdiction to hear Complainants’ allegations. Rather, Complainants’ Motion for Reconsideration largely rehashes flawed jurisdictional arguments raised either in the original Complaint, the Response in Opposition to the Motion to Dismiss, or in the Amended Complaint. Accordingly, the Commission should deny Complainants’ Motion for Reconsideration.

A. The Commission Properly Applied Commission Precedent and Applicable Law in Determining that Complainants Failed to State a Claim Under Section 403(c).

Complainants rehash their previous arguments that the Commission has jurisdiction to review a contract for the sale of real property pursuant to section 403(c). Complainants’ arguments are flawed since they rely on Complainants’ erroneous interpretation of Order No. 154 and the D.C. Circuit Court’s holding in *U.S. Postal Service*. Complainants repeat their previous arguments that the sale of real property is a “nonpostal service” subject to Commission review. As discussed above, Complainants’ belief that all Postal Service activities must consist solely of postal services or nonpostal services is incorrect. Rather, both the Commission and the D.C. Circuit Court acknowledged the existence of a class of revenue generating activities that are not services and therefore not subject to Commission review. These revenue

³⁴ Order No. 2377 at 2.

generating activities that are not services include the sale of real property. Accordingly, the Commission correctly applied both Order No. 154 and the holding in *U.S. Postal Service* in Order No. 2377 when it concluded that Complainants failed to allege a section 403(c) discrimination claim as Complainants' allegations involved the sale of real property and not a service.

Additionally, Complainants contend that Order No. 2377 fails to apply Commission precedent that acknowledges section 3662(a) complaint jurisdiction over allegations of discrimination in violation of section 403(c).³⁵ Complainants cite the Complaint of Capital One Services, Inc., Docket No. C2008-3, and explain that this proceeding focused on a section 403(c) discrimination claim related to providing mailing service contracts. In the Complaint of Capital One Services, Inc., however, the complainant alleged that the Postal Service violated section 403(c)'s prohibition against undue or unreasonable discrimination when the Postal Service declined to enter into a negotiated service agreement (NSA) with Capital One Services on similar terms as the Postal Service entered into with the Bank of America.³⁶ Thus, the underlying controversy in Docket No. C2008-3 involved the complainant's alleged discrimination regarding the provision of a postal service or the establishment of rates and classification, not a contract for the disposal of real property. Therefore, the Capital One complaint is irrelevant to the Complainants' position.

It appears that Complainants argue that in Order No. 2377, the Commission held that it does not have section 3662(a) complaint jurisdiction to hear alleged

³⁵ Motion for Reconsideration at 9.

³⁶ Complaint of Capital One Services, Inc. Regarding Discrimination And Other Violations Of Law By The United States Postal Service, PRC Docket No. C2008-3 (June 19, 2008).

discrimination in violation of section 403(c). However, this is not the case. Rather, the Commission held that Complainants failed to allege a claim of discrimination in violation of section 403(c). The Postal Service does not dispute that the Commission clearly has complaint jurisdiction to hear allegations of undue and unreasonable discrimination in “providing services and establishing classifications, rates, and fees” brought by complainants in their capacity as users of the mail and the Commission has exercised complaint jurisdiction over alleged violations of section 403(c).³⁷ The threshold issue is not whether the Commission has complaint jurisdiction to hear alleged violations of section 403(c) but rather “whether the Postal Service’s sale of the Atlantic Street Station is considered a ‘service’ under section 403[(c)] of [T]itle 39.”³⁸ Since the sale of real property is not a “service,” the Commission held that Complainants failed to allege discrimination for which the Commission has complaint jurisdiction to review.³⁹ Complainants provide no new legal arguments for why the Commission should find that section 403(c) applies to the sale of real property.

Moreover, Docket No. C2008-3 does not support Complainants’ position as the discrimination claims were brought by Capital One in their capacity as mail users. Here, Complainants allege that the Postal Service discriminated against them as potential buyers of real property. Courts have recognized that “[u]sers of the mails” fall within the ambit of 39 U.S.C. § 403(c) when they allege discrimination related directly to postal

³⁷ 39 U.S.C. §§ 403(c) and 3662(a).

³⁸ Order No. 2377 at 6.

³⁹ *Id.*

services and to the establishment of classifications, rates, and fees.⁴⁰ Complainants' assertions here do not concern postal services and Complainants' representations regarding the sale of property do not allege discrimination with respect to the Postal Service's provision of postal services or to the establishment of classifications, rates, and fees. As such, the discrimination claims do not fall within section 403(c).

Complainants further cite to a number of cases in support of their argument claiming that the Commission's jurisdiction extends to breach-of-contract claims. However, Complainants have misapplied the case law they cite. The first case referenced, *LeMay v. U.S. Postal Service*, is inapposite.⁴¹ There, the plaintiff filed suit arguing that late mail service was a breach of contract, but the court directly refuted that claim: "LeMay's complaint is lavishly wrapped in contract clothing, but a court will not be dazzled by pretty wrappings. . . The words echo contract, but the issues are classic questions of postal rates and services."⁴² Complainants appear to contend that the holding in *LeMay* allows the Commission to exercise complaint jurisdiction over any contract dispute. However, the opinion declares the opposite. The case is inapposite, however, as the court there determined that the controversy was exactly the type of rate and service complaint that the Commission has jurisdiction to review under section 3662(a).

The second case Complainants cite is a similar rate and service case couched in

⁴⁰ See *Currier v. Potter*, 379 F.3d 716 (9th Cir. 2004) (holding that individuals had standing because the allegations related to the service and delivery of mail); *UPS Worldwide Forwarding, Inc. v. U.S. Postal Serv.*, 66 F.3d 621 (3d Cir. 1995) (finding that plaintiff had standing because claim related to preferential rates to large capacity mailers).

⁴¹ *LeMay v. U. S. Postal Serv.*, 450 F.3d 797 (8th Cir. 2006).

⁴² *Id.* at 800-801

contract terms. The court dismissed the case because the plaintiff failed to exhaust available administrative remedies, stating that:

Plaintiff does not allege the existence or breach of any specific contract that he or defendant entered into, nor does plaintiff specify any particular contractual obligations that defendant may have violated. Rather, plaintiff more generally complains that he was not provided with proper postal services as advertised. Such a service-related claim cannot avoid the reach of section 3662's administrative remedy simply because it 'echo[es] contract.'⁴³

Both *LeMay* and *Murphy* are actually cases in which the plaintiffs merely cloaked a service complaint as a contract dispute. Moreover, the controversies in these cases were brought by litigants in their capacity as users of the mail. Thus, neither case supports Complainants' argument that the Commission has jurisdiction over contract disputes. Since this controversy involves a contract for the sale of real property and not a rate or service complaint, the Commission correctly applied prior precedent when it dismissed the Complaint.

B. Complainant Misinterprets Section 3662(a) to Arrive at the Erroneous Conclusion that the Commission has Complaint Jurisdiction to Review Alleged Violations of any Provision of Title 39 and any Regulation Promulgated Under Title 39.

As the Postal Service argued in its Motion to Dismiss, Congress granted the Commission limited complaint jurisdiction.⁴⁴ Specifically, the Commission's authority to adjudicate complaints, which is set forth in 39 U.S.C. § 3662(a), allows an interested person to bring a complaint when "the Postal Service is not operating in conformance with the requirements of the provisions of sections 101(d), 401(2), 403(c), 404a, 601, or [chapter 36] (or regulations promulgated under any of those provisions)." In their Motion

⁴³ *Murphy v. U. S. Postal Serv.*, 2014 WL 4437731, at *4 (N. D. Cal. 2014); citing *LeMay*, 450 F.3d at 801.

⁴⁴ Motion to Dismiss at 14-19.

for Reconsideration, Complainants argue that when applying section 3662(a), the Commission has overlooked a “sixth category of jurisdiction”.⁴⁵ Complainants describe this sixth category of jurisdiction as a grant of authority to “enforce the compliance of the USPS to operate within the confines and restrictions and rules set forth in Title 39 and under the regulations adopted, repealed, or modified under those statutory provisions.”⁴⁶

Complainants’ interpretation of section 3662(a) would render the list of enumerated provisions meaningless as they argue that the Commission should have complaint jurisdiction over all provisions of Title 39. This is an inaccurate interpretation of section 3662(a). The language at issue is “or ***this chapter*** (or regulations promulgated under any of those provisions).”⁴⁷ The jurisdictional grant is clearly limited to “this chapter,” meaning Chapter 36 of Title 39, and does not apply to extend to all of Title 39. Thus, the language of section 3662(a) is not as broad as to include authority to enforce the compliance of all of Title 39 and the regulations adopted, repealed, or modified under those statutory provisions, but rather is limited to the enumerated provisions and Chapter 36.

C. The Commission Lacks Complaint Jurisdiction to Review Compliance with All Postal Service Regulations.

In their Motion for Reconsideration, Complainants argue that pursuant to section 401(2), the Commission has authority to enforce Postal Service compliance with its

⁴⁵ Motion for Reconsideration at 9

⁴⁶ *Id.*

⁴⁷ 39 U.S.C. § 3662(a) (emphasis added).

regulations.⁴⁸ Again, this not a new argument as Complainants stated that the Commission had section 3662 jurisdiction to enforce Postal Service compliance with its regulations governing conflict of interests and its Real Estate Handbook in their Response in Opposition to the Postal Service's Motion to Dismiss.⁴⁹ There, Complainants contended that the Commission has jurisdiction to review its claims that the Postal Service violated its regulations governing conflict of interests and its Real Estate Handbook by virtue of section 401(2).

This is an argument that the Commission considered when it granted the Postal Service's Motion to Dismiss the Complaint. In Order No. 2377, the Commission concluded that "39 U.S.C. § 401(2) would apply only if the Postal Service adopted, amended, or repealed rules or regulation inconsistent with [T]itle 39."⁵⁰ The Commission concluded that the Complaint involved an alleged failure to comply with Postal Service regulations and not an allegation that the regulations themselves were inconsistent with Title 39.⁵¹ Accordingly, the Commission concluded that the "Complaint does not fall with the Commission's jurisdiction under 39 U.S.C. § 401(2)."⁵²

Furthermore, the case law that Complainants cite fails to support their argument. In their Motion for Reconsideration, Complainants cite *Richter v. U.S. Postal Service* for the proposition that, "[t]he Postal Regulatory PRC [sic] has exclusive jurisdiction to hear complaints regarding postal rules and regulations within USPS's statutory functions, and

⁴⁸ Motion for Reconsideration at 9-10.

⁴⁹ Response in Opposition to Motion to Dismiss at 11, 19.

⁵⁰ Order No. 2377 at 6.

⁵¹ *Id.*

⁵² *Id.* at 7.

certain other matters.”⁵³ The language quoted by Complainants is not found within the District Court’s order which dismissed the plaintiff’s claims.⁵⁴ Rather, District Court dismissed plaintiff’s claims because the court found that the sovereign immunity was not waived in connection with the plaintiff’s claims.⁵⁵ The District Court’s order does not support Complainants’ position that section 401(2) grants the Commission authority to enforce Postal Service compliance of all regulations, even those not promulgated pursuant to Chapter 36.

Moreover, the language cited to by Complainants is found in the Postal Service’s Brief in Support of their Motion to Dismiss and Complainants take the quoted language out of context.⁵⁶ The controversy in *Richter* was an alleged incident of misdelivery of mail,⁵⁷ and the plaintiff alleged violations of the Domestic Mail Manual, which includes regulations promulgated under chapter 36 of Title 39. Accordingly, *Richter* involved a complaint which alleged noncompliance with regulations related to postal services. Complainants’ attempt to cite the District Court’s ruling in *Richter* to support their argument that the Commission has authority to enforce compliance of all Postal Service regulations, even those unrelated to postal services and which were not promulgated pursuant to chapter 36, falls short. The Commission should continue to apply section 401(2) as Congress intended and it should not adopt Complainants’ interpretation.

⁵³ *Id.*

⁵⁴ Order, *Richter v. U.S. Postal Serv.* No. 8:14-cv-00071 (D. Neb. Aug. 13, 2014).

⁵⁵ *Id.*

⁵⁶ Postal Service Brief in Support of Defendant’s Motion to Dismiss at 15-16, *Richter* No. 8:14-cv-00071 (D. Neb. Mar. 3, 2014).

⁵⁷ Order, *Richter* No. 8:14-cv-00071 (Aug. 13, 2014) at 1.

Additionally, Complainants argue the Commission “has clear jurisdiction over violations of the USPS Handbook procedures to obtain the best value for its real estate sales.”⁵⁸ However, again, the case law Complainants cite fails to support their argument. Rather, the case cited by Complainants, *AT&T v. U.S. Postal Service*, focused on whether the Postal Service’s procurement decisions were reviewable before a federal court.⁵⁹ The jurisdiction of the Commission or the Commission’s complaint proceedings are not discussed in the case, and the holding there does nothing to expand or otherwise change the clear statutory complaint authority outlined in 39 U.S.C. § 3662(a). Thus, again, the case law cited by Complainants is insufficient to support their jurisdictional arguments.

D. The Commission does not Have Complaint Jurisdiction to Consider Alleged Conflicts of Interest as Section 410(b)(2) is not an Enumerated Provision Listed in Section 3662(a).

In arguing that the Commission has jurisdiction to consider Count Two (Conflict of Interest), Complainants cite 39 U.S.C. § 410(b)(2) as providing jurisdictional basis for Commission review.⁶⁰ In Order No. 2377, the Commission reviewed the limited scope of its section 3662 complaint jurisdiction.⁶¹ Complainants’ argument fails to establish Commission jurisdiction under section 3662(a) because section 410 is not one of the enumerated provisions for which the Commission may exercise its complaint

⁵⁸ Motion for Reconsideration at 11.

⁵⁹ *AT&T Corp. v. U.S. Postal Serv.*, 31 F. Supp. 2d 811, 812 (N. D. Ill. 1997).

⁶⁰ Motion for Reconsideration at 10. See Amended Complaint at p. 3.

⁶¹ Order No. 2377 at 5 (“Section 3662(a) permits interested persons to file complaints if they believe ‘the Postal Service is not operating in conformance with the requirements of the provisions of sections 101(d), 401(2), 403(c), 404a, or 601, or this chapter [36] (or regulations promulgated under any of those provisions). . . .”).

jurisdiction.⁶² Thus, while Complainants argue to the contrary, section 410 does not grant the Commission authority to enforce provisions of title 18 of the U.S. Code. The Commission correctly applied 39 U.S.C. § 3662 when it concluded that Count Two does not under the Commission's complaint jurisdiction.⁶³

CONCLUSION

For the reasons discussed above, the Postal Service respectfully requests that the Commission deny Complainants' Motion for Reconsideration.

Respectfully submitted,

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⁶² Notably, Complainants did not repeat their arguments that the Commission has authority to "investigate. . . civil matters relating to the Postal Service" pursuant to section 404(a). Amended Complaint at 3. In Order No. 2377, the Commission stated that "39 U.S.C. § 404(a) does not confer jurisdiction over the claims in the Complaint because section 404(a) is not enumerated under 39 U.S.C. § 3662(a)." Order No. 2377, at 6. The same legal reasoning explains why section 410(b)(2) does not confer section 3662(a) complaint jurisdiction.

⁶³ *Id.* at 7.